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In the Supreme Court of the United States

OCTOBER TERM, 1977

HENNEPIN BROADCASTING ASSOCIATES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-21) is not reported. The decisions and orders of the National Labor Relations Board (A. 2-95)[1] are reported at 215 NLRB 326 and 225 NLRB No. 66.[2]

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[1]"A." refers to the printed appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

[2]After the Board filed its application for enforcement of the order reported at 215 NLRB 326, petitioner moved the court of appeals to remand the case to the Board to hear additional evidence with respect to the appropriateness of reinstatement of the discharged employees. The court of appeals granted that motion, after further hearing the Board reaffirmed its original order (225 NLRB No. 66 (A. 39-40, 93-95)), and the case thereupon returned to the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1977. A petition for rehearing was denied on March 11, 1977 (Pet. App. A-21). The petition for a writ of certiorari was filed on May 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Board's finding that eight employees were discharged for engaging in concerted activity protected by Section 7 of the National Labor Relations Act, rather than for cause.

2. Whether the Board's remedial order was proper.

3. Whether the court of appeals denied petitioner due process by enforcing the Board's order without writing a full opinion.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), provide:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * * *

> Sec. 10. (c) * * * If * * * the Board shall be of the opinion that any person named in the complaint has engaged in * * * any such unfair labor practice, then the Board shall * * * issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act * * *.

STATEMENT

1. *The Board's Findings of Fact.* Petitioner operates two radio stations in New Hope and Minneapolis, Minnesota. At the time this case arose in June 1973, it employed four AM and six FM announcer-engineers ("announcers") (A. 3, 5). Announcers are licensed by the Federal Communications Commission ("FCC"), and are usually the only persons present at the studios who are authorized to operate the station's broadcast equipment (A. 44-45, 77). FCC regulations require them to make appropriate entries in the station's program logs during the broadcast, and authorize them to turn the station's transmitters on at the beginning, and off at the end, of the broadcast day (A. 45, 64, 69, 77).

In late May and June,[3] AM announcer Richard Carey and his FM counterpart Gregory Ellsworth led an organizing campaign among the announcers on behalf of the American Federation of Television and Radio Artists, Twin Cities Local, AFL-CIO ("the Union") (A. 5-6). By June 14, a majority of the announcers had signed Union authorization cards, and on June 15 the Union advised petitioner that it represented a majority of the employees and demanded recognition (A. 6, 11).

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[3]All dates are 1973 unless otherwise indicated.

Petitioner received the Union's letter on Monday morning, June 18. On that same day, Gerald D. Cunning, petitioner's program director, questioned several announcers about their and Carey's union activity, and learned from the one announcer who had declined to join the Union that Carey had solicited him to sign a Union card (A. 5-7, 41). Cunning reported this to petitioner's Vice President Robert J. Rock, who is also the general manager for both stations (A. 5, 7). During the next several days, petitioner unlawfully promised two employees wage increases (A. 14-15), and on Thursday morning, June 21, Cunning discharged Carey (A. 8, 41).[4]

On Thursday evening several employees met at Carey's home and voted to strike the next evening at 5:00 p.m. to protest his discharge (A. 9). On Friday afternoon, between 3:15 and 4:00 p.m., Carey, Ellsworth, and another announcer met with a Union official at the office of the Union's counsel to discuss their plans for the strike (A. 9, 42-43). At about 4:00 p.m., Ellsworth telephoned announcer Gregory Peterson, who was on duty at the AM station, and reminded him to turn off the transmitter when the strike began; otherwise, Ellsworth explained, Peterson could jeopardize his FCC license (A. 43). The following "sign-off" then was dictated to Peterson (A. 43-44):

> This is KTCR [the AM station's call letters], now concludes its broadcast day. KTCR is owned and operated by [petitioner], maintaining studios and transmitters at [address]. KTCR is licensed to the city of Minneapolis on a federally assigned frequency of 690 kilocycles. Some of the programs heard on KTCR were prerecorded.

[4]Petitioner does not appear to challenge the propriety of the Board's conclusions, sustained by the court of appeals, that it violated Section 8(a)(1) of the Act by interrogating employees and promising benefits, and violated Section 8(a)(3) and (1) of the Act by discharging Carey because it believed he was "the one responsible for promoting the Union's organizational campaign" (A. 13-15, 32-33).

The same sign-off, with the FM station's address and frequency substituted, was dictated to FM announcer John Bortnem (A. 9, 44-45).

At about 4:30 p.m., Union counsel telephoned General Manager Rock to notify him of the impending strike (A. 43). Rock was in his office but was not taking any telephone calls (A. 43). Counsel then attempted unsuccessfully to reach petitioner's attorney, and left a message that the stations would be going off the air at 5 p.m. (A. 43).

At 5 p.m., Peterson read the AM sign-off and turned off the transmitter (A. 10, 43). He recorded in the program log that the station had gone off the air at 1700 hours, put away his records, closed the windows, turned off the fan, and locked the studio (A. 10, 43-44). Peterson, Ellsworth, and Carey then began to picket with signs accusing petitioner of being "unfair"; announcer James Hubbard joined them shortly after 7:00 p.m. (A. 10, 43-45, 67). Similarly, at the FM studio, Bortnem read the sign-off at 5 p.m. and announcer Robert Gustafson turned off the transmitter (A. 9, 44). Bortnem then made the appropriate entry in the log, and, with the assistance of announcers Patrick McKeever and Gustafson, turned off the lights and other equipment and locked the FM studio (A. 9, 44). All three went outside and began to picket (A. 9).

The AM station returned to the air about 5:30 p.m., and the FM station resumed broadcasting about 6:45 p.m. (A. 45). Petitioner encountered no difficulty turning on the transmitters or otherwise resuming broadcasting, and there is no evidence that either station's equipment was tampered with or damaged in any way (A. 65).

Shortly after 7 p.m.– after both stations had resumed broadcasting—Rock approached Ellsworth and Hubbard outside the AM studio and said that the announcers who had turned off the station were fired (A. 10, 11, 17, 46). Although neither Ellsworth nor Hubbard was scheduled to be on duty then, Rock ordered them to return to their jobs immediately or be discharged. They refused to return until the matter of Carey's discharge had been settled, and Rock fired them (A. 10-11, 17, 46). Rock then demanded that Peterson (who was scheduled to work until 9:00 p.m.) return to the studio; Peterson refused and was discharged (*ibid.*). Rock then went to the FM studio and told McKeever and Gustafson that they would be fired if they did not return to their next regularly scheduled shifts; both gave Rock their keys to the studio (*ibid.*).

Announcers Raymond Walby and Rick Campbell joined the strike several days later. On or about July 6, Program Director Cunning demanded that Bortnem surrender his key to the studio, which he did (A. 18, 47).

On June 26, August 16, and September 6, the Union's counsel made unconditional offers on behalf of all eight striking announcers to return to work. Petitioner refused to reinstate any of them (A. 47-48).

2. *The Decisions Below*. The Board held, in agreement with the Administrative Law Judge who heard the case initially, that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging the eight striking announcers. The Board ruled that the discharged employees were engaged in concerted activity protected by Section 7 of the Act when they struck in protest of the unlawful firing of their co-worker Carey (the leading Union advocate) and that the discharges "had the effect of discouraging membership in the Union"

since they were an outgrowth of petitioner's contemporaneous and "vigorous effort * * * to influence and coerce its employees to abandon their efforts to have the Union represent them" (A. 33-34).

Accordingly, the Board ordered petitioner to cease and desist from the unfair labor practices and from otherwise interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights (A. 26-27, 35, 93, 95). It also ordered petitioner to offer immediate and full reinstatement with back pay to Carey and the eight discharged strikers (A. 25-28, 34-35, 93, 95). Rejecting petitioner's numerous contentions opposing that remedy, the Board concluded that (A. 72, 89) "nothing in the Union's or the employees' conduct in connection with the initiation of the strike affected either the protected status of the strike or the reemployability of any of the complainants," and that "nothing in [their] conduct after the strike began warrants modification of their reinstatement and backpay rights as unfair labor practice strikers and as employees discriminatorily denied employment."

Finally, the Board ordered petitioner to recognize and bargain with the Union upon request.

The court of appeals sustained the Board's findings and conclusions and enforced its order in full (Pet. App. A-21).

ARGUMENT

1. Petitioner's claim (Pet. 9-15) that the Board erred in finding that the eight employees were discharged for engaging in protected concerted activity rather than for cause involves only the application of settled principles to the particular facts of this case and does not warrant further review. It is axiomatic that the Act forbids an employer to discharge employees who strike in protest of the firing of a fellow workman for union activities. See

Houston Insulation Contractors Association v. *National Labor Relations Board*, 386 U.S. 664, 668-669; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 50-51. The evidence summarized at pages 3-6, *supra*, amply supports the Board's finding that the employees were discharged for engaging in protected activity.

The Board properly rejected petitioner's claim that the firings were justified on the ground that the conduct of the striking announcers jeopardized petitioner's licenses to broadcast. The strike had a *de minimis* impact on petitioner's ability to broadcast and all the discharges occurred after that minor interruption had ended. More importantly, the Federal Communications Act does not "restrict the right of employees to strike or quit their jobs, either singly or in concert." *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 751 (C.A. 9). Accord: *Central Broadcasting Corp., d/b/a WENO*, 182 NLRB 866, 872, enforced, 441 F. 2d 1145 (C.A. 6); *Chamberlin and Muller*, 21 FCC 231 (holding that licensed radio operators did not breach FCC regulations or jeopardize their licenses when, as part of a labor dispute, they turned off the transmitter, shut down the station, and left the premises before completion of their shift).[5]

Finally, contrary to petitioner's claim (Pet. 13), the announcers were not required to demand Carey's reinstatement, and to give notice, prior to striking. See *National Labor Relations Board* v. *Washington Aluminum Company*, 370 U.S. 9, 14.

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[5]Cf. *Didriksen*, 21 FCC 268, affirmed, 254 F. 2d 354 (C.A. D.C.), temporarily suspending the licenses of operators who manipulated the transmitter's adjustments and controls before striking.

2. Petitioner contends (Pet. 16-17) that the Board's reinstatement and backpay order, sanctioned by Section 10(c) of the Act, is unconstitutional. It has long been settled, however, that Congress may empower an administrative agency to impose such remedies to effectuate a valid legislative purpose. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1, 47-49; *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U.S. 177, 187-189. The imposition of those remedies here was proper. The Board's conclusion, sustained by the court of appeals, that the strikers did not engage in any conduct either at the inception of the walkout or thereafter that would warrant withholding the remedy of reinstatement and backpay is amply supported by the record evidence (A. 41-89).

3. Petitioner's claim (Pet. 17-18) that the court of appeals denied due process by summarily disposing of the case pursuant to the court's Local Rule 14[6] is unpersuasive. See *Taylor* v. *McKeithen*, 407 U.S. 191, 194-195, n. 4; *United States* v. *Baynes*, 548 F. 2d 481 (C.A. 3); *National Labor Relations Board* v. *Amalgamated Clothing Workers of America, AFL-CIO, Local 990*, 430 F. 2d 966 (C.A. 5).

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[6]That Rule (Pet. App. A1-A2) provides in pertinent part:

> When the court determines that * * * the order of an administrative agency is supported by substantial evidence on the record as a whole * * * and * * * that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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